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Asbir, Hira Singh & Co v Supramaniam a/l Pitchaimuthu & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–48 OF 1999
ABDUL HAMID EMBONG J
28 OCTOBER 1999

B

Civil Procedure *— Declaration — Application for — Declaration that agreement for solicitors' fees was fair, reasonable and enforceable against defendant — Whether plaintiff should have applied for summary judgment instead*

C ***Contract*** *— Coercion — Proof of — Fairness or reasonableness of agreement — Whether proved — Contracts Act 1950 s 15*

The plaintiff agreed to act for the first defendant (D1) in several criminal charges and civil suits. D1 orally agreed with the plaintiff that the plaintiff would, inter alia, be paid the sum of RM40,000 as fees for the criminal and civil cases. Subsequently, D1 and the plaintiff D reduced into writing their oral agreement on the fees (exh HS-5). D1 personally inserted the figure RM40,000 in the presence of the partner of the plaintiff and his clerk. When D1 failed to settle the fees, the plaintiff by an ex parte summons-in-chambers sought for the following orders: (i) to declare that the agreement for the fees was fair and reasonable and was enforceable by the plaintiff against D1; (ii) further E or alternatively the plaintiff to have its bills of costs taxed; (iii) an injunction to restrain the defendants from withdrawing the sums of money standing in the respective accounts pending the complete disposal of this action. The ex parte injunctions had been granted by the court on 10 February 1999. D1 contended that he was coerced by F the plaintiff to sign HS-5. It was also submitted that this hearing should only be confined to a determination of whether to lift the injunction or allow it to remain and not to make a declaration as sought for by the plaintiff because this tantamount to making a final order. It was submitted that the plaintiff should have applied for a summary judgment. The issues before the court were: (i) whether G HS-5 was valid; and (ii) whether the plaintiff could recover its fees as agreed under HS-5.

Held, allowing the application:

(1) HS-5 was actually a confirmation in writing of the oral agreement. H D1's allegation that he was coerced by the plaintiff into signing HS-5 was totally without basis. D1 had failed to prove any of the elements of coercion under s 15 of the Contracts Act 1950. From the evidence, HS-5 was valid (see pp 88H, 89D–E)

(2) The court was clothe with a discretionary power to ratify and enforce HS-5 if it was found that the agreement was fair and I reasonable between the parties or if it was found otherwise, the court could declare the agreement as void, cancel it and direct that costs, fees, charges and disbursement be taxed. The plaintiff need

not separately apply for a summary judgment and may proceed to ask for the declaratory order sought while the court review the interim injunction to decide its continuance or discharge. If the court is satisfied that the plaintiff is entitled to the whole remedy before the action is tried and where there is clearly no defence or that it was raised merely to cause delay, then this court may grant final relief (see p 91E–G).

(3) The burden of proving fairness and reasonableness of the agreement was on the plaintiff. The court found that a lot of work had been done by the plaintiff stretching from 1982 to 1996. The court found that the RM40,000 as agreed between the parties to be fair and reasonable. There was also no evidence to show that the plaintiff was domineering in its conduct towards D1. The execution of HS-5 was a transaction at arm's length and D1 was in no way disadvantaged by reason of the confidential relationship he had with the plaintiff. Further, the plaintiff had satisfactorily rebutted the presumption of undue influence cast upon it by virtue of the existing solicitor-client relationship. D1, on the other hand, had not advanced any cogent argument or proof to contradict either the validity of HS-5 or its reasonableness (see pp 92H, 94A–D).

(4) After serious consideration of the background to this application, the court allowed the plaintiff the declaratory relief sought and ordered that HS-5 be enforced. The interim injunction was confirmed and shall continue until execution of this order (see p 94G–H).

[Bahasa Malaysia summary

Plaintif telah bersetuju untuk mewakili defendan (D1) di dalam beberapa pertuduhan dan guaman sivil. D1 secara lisan telah bersetuju dengan plaintif bahawa plaintif akan, antara lain, dibayar sejumlah wang sebanyak RM40,000 sebagai yuran untuk kes-kes jenayah dan sivil itu. Kemudian, D1 dan plaintif telah menulis perjanjian lisan tersebut berkenaan dengan yuran (eksh HS-5). D1 sendiri telah memasukkan jumlah RM40,000 tersebut di hadapan seorang rakan kongsi plaintif dan keraninya. Apabila D1 gagal menyelesaikan yuran tersebut, plaintif melalui saman-dalam-kamar secara ex parte telah memohon untuk perintah-perintah berikut: (i) untuk mengisytiharkan bahawa perjanjian tersebut untuk yuran adalah adil dan munasabah dan boleh dikuatkuasakan oleh plaintif terhadap D1; (ii) selanjutnya dan secara alternatif plaintif akan mendapatkan bil kosnya ditetapkan; (iii) suatu injunksi untuk menghalang defendan-defendan daripada mengeluarkan jumlah wang tersebut yang masih ada di dalam akaun masing-masing sehingga selesainya tindakan ini. Injunksi ex parte telah diberikan oleh mahkamah pada 10 Februari 1999. D1 menegaskan bahawa beliau telah dipaksa oleh plaintif untuk menandatangani HS-5. Adalah juga

dihujahkan bahawa perbicaraan ini hanya patut dihadkan kepada penentuan sama ada untuk membatalkan injunksi tersebut atau membenarkannya untuk kekal dan bukan membuat suatu deklarasi seperti yang diminta oleh plaintif oleh kerana ini terjumlah kepada membuat suatu perintah muktamad. Adalah juga dihujahkan bahawa plaintif sepatutnya memohon untuk penghakiman terus. Isu-isu di hadapan mahkamah adalah: (i) sama ada HS-5 adalah sah; dan (ii) sama ada plaintif boleh mendapat kembali yurannya seperti yang dipersetujui di bawah HS-5.

Diputuskan, membenarkan permohonan tersebut:

(1) HS-5 adalah sebenarnya suatu pengesahan bertulis berkenaan dengan perjanjian lisan tersebut. Pengataan D1 bahawa beliau dipaksa oleh plaintif untuk menandatangani HS-5 adalah tidak berasas langsung. D1 gagal untuk membuktikan sebarang elemen paksaan di bawah s 15 Akta Kontrak 1950. Daripada keterangan tersebut, HS-5 adalah sah (lihat ms 88H, 89D–E).

(2) Mahkamah mempunyai kuasa budi bicara untuk meratifikasikan dan menguatkuasakan HS-5 jika didapati bahawa perjanjian tersebut adalah adil dan munasabah antara pihak-pihak atau jika didapati sebaliknya, mahkamah boleh mengisytiharkan perjanjian tersebut sebagai batal, membatalkannya dan mengarahkan kos-kos, yuran-yuran, pembayaran-pembayaran dan juga pembayaran perbelanjaan ditetapkan. Plaintif tidak perlu secara berasingan memohon untuk penghakiman terus dan boleh terus memohon perintah perisytiharaan yang dipohon semasa mahkamah mengkaji semula injunksi interim untuk memutuskan penyambungannya atau pelepasannya. Jika mahkamah berpuas-hati bahawa plaintif adalah berhak kepada remedi penuh sebelum tindakan dibicara dan di mana tidak terdapat pembelaan yang jelas atau ia dibangkitkan semata-mata untuk menyebabkan kelengahan, maka mahkamah boleh memberikan relif muktamad (lihat ms 91E–G).

(3) Beban untuk membuktikan keadilan dan kemunasabahan perjanjian tersebut adalah di atas plaintif. Mahkamah telah mendapati bahawa banyak kerja telah dilakukan oleh plaintif dari 1982 ke 1996. Mahkamah mendapati RM40,000 seperti yang dipersetujui antara pihak-pihak sebagai adil dan munasabah. Tiada juga keterangan untuk menunjukkan bahawa plaintif merupakan pihak yang dominan di dalam tindakannya ke atas D1. Pelaksanaan HS-5 adalah suatu transaksi bersemuka dan D1 tidak dengan apa cara sekali pun menerima keburukan akibat hubungan peribadinya dengan plaintif. Selanjutnya, plaintif telah dengan jayanya mematahkan andaian pengaruh tak wajar yang diletak ke atasnya melalui kewujudan hubungan peguam-anak guam. Sebaliknya, D1 tidak mengemukakan sebarang hujahan yang menyakinkan atau bukti untuk menyangkal sama ada kesahan HS-5 atau kemunasabahannya (lihat ms 92H, 94A–D).

(4) Selepas pertimbangan yang serius akan latar belakang permohonan ini, mahkamah membenarkan relif deklarasi yang dipohon dan mengarahkan HS–5 dikuatkuasakan. Injunksi interim tersebut adalah disahkan dan akan berterusan sehingga pelaksanaan perintah ini (lihat ms 94G–H).]

Notes

For cases on application for declaration, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1500–1512.

For cases on coercion generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1833–1834.

Cases referred to

Cayman Development (Kedah) Sdn Bhd v Puah Kiew & Ors [1990] 3 MLJ 110 (refd)

Dato HL Wrigglesworth v Hj Zakaria Bin Yusoff [1995] 3 CLJ 64 (refd)

Hongkong Bank (M) Bhd v Raja Letchumi A/P Ramarajoo [1996] 2 MLJ 36 (refd)

Howell Thomas, Re [1893] 1 QB 670 (refd)

Stedman v Collett (1854) 51 ER 1171 (refd)

Stuart, Re; ex parte Catchcart [1893] 2 QB 201 (refd)

Westmelton (Vic) Pty Ltd (Receiver and Manager appointed) v Archer and Shulman (1982) VR 305 (refd)

Legislation referred to

Contracts Act 1950 s 15

Legal Profession Act 1976 ss 116, 118

T Gunaselan (*Hira Singh* and *Anit Kaur* with him) (*Asbir Hira Singh & Co*) for the plaintiff.

Su Keong Siew (*Bachan & Kartar*) for the defendant.

Abdul Hamid Embong J: By an ex parte summons in chambers (encl 3), the plaintiff, a legal firm, sought for the following orders:

(1) To declare that the agreement dated 17 February 1992 for the fees of sum of RM40,000 between the plaintiff and the first defendant is fair and reasonable and is enforceable by the plaintiff against the first defendant.

(2) Further or alternatively, the plaintiff do tax its bills of costs on solicitor-client basis against the first and second defendants and recover such taxed costs from the funds standing to the account of the first and second defendants with the third, fourth and fifth defendants or if the same is insufficient, the first and second defendants to pay to the plaintiff the taxed costs.

(3) An injunction to restrain the first and second defendants whether by themselves or their servants or agents or otherwise from making any

attempts to withdraw the sums of money standing in the respective accounts with the third, fourth and fifth defendants pending the complete disposal of this action.

(4) The third, fourth and fifth defendants abovenamed whether by themselves or their servants or agents or any of them or otherwise be restrained by injunction until the complete disposal of this action or further order, from parting with the following sums of money or any part thereof standing to the credit of the first and second defendants in:

(a) the accounts of the first defendant with:

(i) the third defendant to the extent of RM35,570.37;

(ii) the fourth defendant to the extent of RM23,652.62,

(b) the account of the second defendant with the fifth defendant to the extent of RM13,040.50,

as is due and owing to account of estimated legal fees.

On 10 February 1999, after hearing the application, this court granted the ex parte injunctions as prayed for in prayers 3 and 4 with the usual undertaking on damages and set down the summons for hearing inter partes.

The factual background of this case is long and vacillating. I am grateful to learned counsel for the plaintiff for having produced a convenient precis by way of chronological events leading to this application. The salient facts pertinent to this application as borne out from numerous affidavits are now recounted.

In February 1982, the plaintiff agreed to act for the first defendant (D1) in CS 127/1982. D1 then voluntarily deposited four banks saving books with the plaintiff to show that he had the money to pay the agreed fees to the plaintiff. On 14 September 1982, D1 also retained the plaintiff to defend him on seven criminal charges under s 411 of the Penal Code and which arose out of the same civil suit for which the plaintiff was earlier retained. In September 1982, D1 orally agreed with En Hira Singh (the husband partner of the plaintiff firm), to the following:

(1) The plaintiff would be paid the sum of RM40,000 as fees for the criminal and civil cases;

(2) In addition, any party and party costs that the court may award would be exclusively for the plaintiff; and

(3) The plaintiff may appropriate the costs and the agreed fees would be paid from the said funds.

From 1983 onwards, spreading over several years, three of the seven criminal charges against D1 were tried resulting in D1's acquittal, on 3 May 1991. On 17 February 1992, D1 and the plaintiff reduced into writing, their 1982 oral agreement on the fees (see exh HS-5, to encl 4). D1 personally inserted the figure '$40,000' in the presence of En Hira Singh and his clerk, Darshan Singh. HS-5 is now reproduced in full, for easy reference. A

cursory glance will show that the terms of the agreement are by no means uncertain, nor the reasons why it was made.

Supramaniam s/o Pitchamuthu
Block C 13, Sungai Pari Tower
302000 Ipoh
17 February 1992

M/s Asbir, Hira Singh & Co
Advocates & Solicitors
No 6 Jalan Dato Maharajalela
30000 Ipoh

Dear Sirs

I hereby confirm our earlier agreement on the fees payable to you in the sum of $40,000.

My money is now stuck in the banks and the balance sum now owing will be paid to you as soon as I get my money from the banks.

The sum of $40,000 is the total sum which I will pay for the criminal case: Ipoh Magistrate's Court Criminal Case No BAC 363/1982 which has been concluded and the Civil Suit: Ipoh High Court Civil Suit No 127/1982 consolidated with 135/1982.

In addition to the aforesaid sum, any party and party costs that the court may award would be exclusively yours and you may appropriate it.

Yours faithfully

sgd
Supramaniam s/o Pitchamuthu

On 15 December 1992, on the plaintiff's application, the deputy public prosecutor withdrew all other outstanding charges against D1. On 29 July 1997, the plaintiff wrote to D1 requesting for an appointment for instructions and settlement of its fees. On 30 July 1997 D1 replied stating that he had paid a lump sum to the plaintiff and requested for a bill on any outstanding payments. On 1 October 1997, the plaintiff responded saying that the alleged payment of a lump sum was never made and forwarded D1 particulars of all costs awarded to and against D1 in the civil case and a bill on the criminal charges. D1 replied on 7 October 1997, disagreeing with the plaintiff's bills. There were various other correspondences between the parties after that, which need not be particularized. Suffice to say that this dispute now sought the determination of this court on the following issues:

Whether the written agreement dated 17 February 1992 is valid

It is this court's finding that the written agreement, ie HS-5 is valid. HS-5 is actually a confirmation in writing of what had been agreed to between D1 and En Hira Singh sometime in September 1982. D1 had voluntarily signed that agreement and agreed to pay the sum of RM40,000 to the plaintiff as fees payable to the latter for defending D1 in CS 127/82 and the seven criminal charges facing him. In his affidavit in reply (encl 11), D1 had deposed that he was coerced by En Hira Singh into signing HS-5 and that the latter threatened him that he would not appear in court on 17 December

1992 if D1 refused to sign HS-5 (see para 13 of encl 11). To this, En Hira Singh had replied (see para 11 of encl 13) that HS-5 was voluntarily signed by D1 in the reception area of plaintiff's office and in the presence of one Darshan Singh. Encik Hira Singh denied any coercion or threat made on D1. It was also affirmed by En Hira Singh that D1 had actually been acquitted of the three criminal charges prior to 31 May 1991 and that the other charges pending against D1 were withdrawn on 15 December 1992. There was also no proceeding in court on 17 December 1992. Evidence was also adduced through the affidavit of one Nadaraja a/l Karuppiah (encl 15), a government pensioner who had recommended En Hira Singh to D1 to initially represent D1 in CS 127/82. Nadaraja had deposed that he knew of the oral agreement in 1982 when D1 agreed to the payment of RM40,000 as the total fees of the plaintiff in acting for D1 for both the civil suit and the criminal matter. Nadaraja also affirmed that he was aware that D1 had deposited his bank saving account books with the plaintiff assuring the latter that he had the money to pay the fees. Darshan Singh, a clerk in the plaintiff's firm, also affirmed in his affidavit (see para 4 encl 14) that D1 had voluntarily signed HS-5 in his presence in the plaintiff's office. D1 had also entered in his own handwriting the sum RM40,000 into HS-5 and had never complained about signing HS-5 either then or on the several occasions after that when D1 met up with Darshan Singh. This fact was never denied by D1. (see D1's reply to encl 14 at encl 33). On D1's allegation that he was coerced by En Hira Singh into signing HS-5, I find this to be totally without basis and in the face of the evidence to the contrary as mentioned above, this matter remains merely a bare allegation, which this court rejects. Under s 15 of the Contracts Act 1950, a contract can be vitiated by coercion if such act can be proved by the person alleging it. D1 must therefore prove one of the elements under s 15 to succeed on this point.

Section 15 of the Contracts Act 1950 states:

> 'Coercion' is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

D1 had also alleged in his affidavits (encls 4, 11, 21, 23 and 31) that he had paid the plaintiff varying sums of RM58,000, RM54,564.52, RM41,514.12 and RM41,514.13. I find no contemporary documents such as receipts or letters to support these allegations. Puan Asbir Kaur, the wife-partner in the plaintiff's firm in her affidavit (encl 35) had denied all those allegations by D1 that such payments were made to the plaintiff, save for a sum of RM2,000 paid on 13 September 1982, for which a receipt was issued. The court had also found the allegation by D1 that receipts for those payments were not issued because the plaintiff wanted to evade income tax as wholly unsubstantiated and rejected the same. From the evidence, I have no hesitation in holding HS-5 to be a valid and for the reasons discussed below, enforceable. In fact, even without the written agreement, the plaintiff, on the facts, would have still succeeded in enforcing the oral agreement agreed

to with D1 in 1982. It is not mandatory, to reduce that oral agreement into writing, for the plaintiff to prove that its fees was fair and reasonable. In *Dato HL Wrigglesworth v Hj Zakaria Bin Yusoff* [1995] 3 CLJ 64, it was held by Idris bin Yusoff J, that:

> Section 116 is not a mandatory provision requiring the agreement to be reduced to writing — it merely says that the solicitor may make an agreement in writing and to make it binding, the client is required to sign it. If, however, for some reasons the agreement is not reduced to writing, it does not totally shut out the solicitor from claiming his costs for he can still fall back on s 121(1).

Whether the plaintiff can recover its fees as agreed to under the written agreement, HS-5

This court has been asked to enforce HS-5 under ss 116 and 118 of the Legal Profession Act 1976 ('the LPA') which provide:

> 116 Advocate and solicitor may enter agreement for costing contentious business
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> (1) Subject to the provisions of any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either at the same rate or at a greater or a lesser rate than the rate at which he would otherwise be entitled to be remunerated.
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> (2) Every such agreement shall be signed by the client and shall be subject to this Part.
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> 118 Enforcement of agreements
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> (1) No action or suit shall be brought or instituted upon any agreement as is referred to in section 116, but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced, varied or set aside by suit or action by summons, motion or petition by any person or the representatives of any person being a party to such agreement, or being alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges or disbursements in respect of which the agreement is made, by the court in which the business or any part thereof was done, or a judge of the court, or, if the business was not done in any court, then by the High Court or a judge of the High Court.
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> (2) Upon any such summons, motion or petition, if it appears to the court or a judge that such agreement is in all respects fair and reasonable between the parties, the agreement may be enforced by the court or a judge by rule or order, in the manner and subject to the conditions, if any, as to the costs of the summons, motion or petition as the court or the judge thinks fair and reasonable.
>
> (3) If the substantive terms of any agreement are deemed by the court or the judge to be unfair or unreasonable, the agreement may be declared void, and the court or judge may thereupon order the

A agreement to be given up for cancellation, and may direct the cost, fees charges and disbursements incurred or chargeable in respect of the matters included therein to be taxed, in the same manner and according to the same rules as if the agreement has not been made.

Provided that the court or judge may amend or ratify the agreement where not all the substance of the agreement is unfair or
B unreasonable.

It is clearly provided that a party to an agreement may apply to the court or a judge in chambers (see in *Re Howell Thomas* [1893] 1 QB 670) by way of summons, motion or petition. In this case, the matter was correctly pursued by an ex parte summons in chambers, initially to obtain an injunction
C against D1. At the inter partes hearing, the plaintiff had asked that this court ratify the written agreement (HS-5) and make a declaration to that effect. Mr Su, learned counsel for D1 had submitted that this hearing should only be confined to a determination of whether to lift the injunction or allow it to remain, and not to make a declaration as sought for in prayer 1 of the plaintiff's summons because this tantamounts to making a final order which
D is not appropriate at this juncture and requiring a resolution of the conflict of facts which needed viva voce examination of witnesses. Encik Su also submitted that if the plaintiff is seeking for a final judgment now, it should have applied for a summary judgment pursuant to O 14 of the Rules of the High Court 1980, which is not the case here.

E In my view, this court is clothe with a discretionary power to ratify and enforce HS-5 if it finds that that agreement is, in all respects, fair and reasonable between the parties or if the court finds otherwise, may declare that agreement as void, cancel it and direct that costs, fees, charges and disbursements be taxed. This court may also amend the agreement if it finds that not all its substance to be unfair or unreasonable (see s 118(3) LPA). I
F am also of the view that the plaintiff need not separately apply for a summary judgment and may proceed to ask for the declaratory order sought while this court reviews the interim injunction to decide its continuation or discharge. In this case, a writ has been issued seeking for the same declaratory order which, in my opinion, the court is entitled to grant
G forthwith upon evaluating the affidavit evidence. If the court is satisfied that the plaintiff is entitled to the whole remedy before the action is tried and where there is clearly no defence or that it was raised merely to cause delay, then this court may grant a final relief (see *Cayman Development (Kedah) Sdn Bhd v Puah Kiew & Ors* [1990] 3 MLJ 110).

H Having examined the validity of HS-5, in that it was made with the consensus ad idem of both parties and not void under any of the general grounds found in the Contracts Act 1950, this court will next have to determine that the agreement was fair and reasonable.

Mr Gunaselan, learned counsel for the plaintiff, referred to the English Court of Appeal case in *Re Stuart, ex p Catchcart* [1893] 2 QB 201, and
I urged this court to apply the same test. *Re Stuart* was a case which discussed the application of ss 8 and 9 of the English Attorneys' and Solicitors' Act 1870 which are in pari materia to our s118(1) and (2) LPA 1976.

An extract from the headnote of the report in *Re Stuart* is now reproduced, with some editing, for easy reference: A

> A solicitor was employed by the defendant in lunacy proceedings to attend the taxation of the petitioner's cost which she had been ordered to pay, and it was agreed in writing that the solicitor should be paid 5 per cent on the amount taxed off the bill of costs. The bill of costs contained items for daily refreshers to counsel for exceeding the maximum amount per diem allowed by the rules, and of the whole bill of 5000 nearly 2000 was taxed off, the principal part of which consisted of such refreshers. On an application under the Attorneys' and Solicitors' Act, 1870, by the defendant to set aside the agreement as unfair and unreasonable, Lord Esher MR for the Court of Appeal held that: B
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> > 'that such an agreement must not only be fair in the sense that it was understood by the client, but must be reasonable in amount, having regard to the work done,' C
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> His Lordship went on to say:
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> > 'With regard to the fairness of such an agreement, it appears to be that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates D that agreement that satisfies the requirement as to fairness. But the agreement must also be reasonable, and in determining whether it is so the matters covered by the expression 'fair' cannot be re-introduced. As to this part of the requirements of the statute, I am of opinion that the meaning is that when an agreement is challenged the solicitor must not only satisfy the court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the court that E the terms of that agreement are reasonable. If in the opinion of the court they are not reasonable, having regard to the kind of work which the solicitor has to do under the agreement, the court are bound to say that the solicitor, as an officer of the court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner.' F

Although decided over a century ago, I am inclined to accept the definition of fairness and reasonableness applied in *Re Stuart*. In the instant case, I find that D1 fully understood and appreciated HS-5 when he signed it at the plaintiff's office. Nowhere in all his affidavits had D1 said otherwise. D1 was also conversant in English, the language of HS-5, as is clearly evident from G his other letters to the plaintiff written in English. The signing of HS-5, as I had earlier found was merely to reiterate in writing what had been orally agreed to earlier, in September 1982. When HS-5 was signed by D1, most of the work was done by the plaintiff and that the scope and type of work done was known to D1.

The burden of proving fairness and reasonableness of the agreement is H on the plaintiff, as solicitors acting for D1 and if I may add, taking the cue from Lord Esher J's words, as an officer of the court. I also accept as correct law, the commentary in *The Law of Advocates and Solicitors in Singapore and West Malaysia* (2nd Ed) at p 693 stating the reason for the first limb of the above proposition, which is: I

> The reason is that the solicitor stands in a fiduciary relation with his client and the courts apply the presumption that the client's will was overborne in making the agreement.

In *Westmelton (Vic) Pty Ltd (Receiver and Manager Appointed) v Archer and Shulman* (1982) VR 305, the Supreme Court of Victoria expounded the proposition in the following way:

> The applicable rule or test, necessarily general, was as follows: in some cases of confidential relationship, and solicitor and client is one of them, where the person (conveniently called the confidant) in whom the confidence is reposed by the other person has dealings with that other person, the court views the transactions with suspicion, and applies a rebuttable presumption that the other's will was overborne by the confidence he placed in the confidant, and the court imposes a burden on the confidant to prove that in all the circumstances the dealings were at arms' length and that the other's will was in no way overborne by the relationship of confidence. (For brevity, the Full Court referred to this presumption as a presumption of 'undue influence'.) The presumption applies to all cases of solicitors dealing with clients, but the extent and weight of the burden cast upon the solicitor or other person in whom the confidence is reposed, and the matters of which the court will require to be satisfied before it will regard the presumption as having been rebutted, must vary with all the circumstances of the case.

In this respect, the affidavit in support of this application of En Hira Singh (encl 4) had deposed to the following:

> 12 The agreed fees of RM40,000 was for the following work:
>
> (a) Criminal trial of seven charges which resulted in acquittal after 17 days of trial spread over many years. I crave leave to refer to the affidavit by the Bank Manager of HSBC, Mr Koo Hock Loong affirmed on 28 June 1982 in the Civil Suit, a photostat copy of which is annexed hereto and marked as 'HS-6'.
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> (b) Civil Suit No 127-1982: setting aside Injunctions, third party proceedings, amendment of pleadings, stay of execution, leave to appeal, striking out and taxation against the first defendant both at the High Court, Supreme Court and the Federal Court.
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> 12.1 The sum of RM40,000 and party and party costs (now not available for the plaintiff) agreed were more than reasonable for the work done between the time frame of 1982 and 1996. The total sum claimed by HSBC against the first defendant was RM171,000 and against his family was RM83,900 totalling RM254,900. I crave leave to refer to the Reamended Statement of Claim filed in the Civil Suit, a photostat copy of which is annexed hereto and marked as 'HS-7'.
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> 12.2 The first defendant had requested the plaintiff to defend his —
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> (i) brother, Nadarajan a/l Pitchaimuthu — 4th defendant in the Civil Suit and second defendant herein;
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> (ii) sister, Mageswari a/p Pichaimutu — 5th defendant in the Civil Suit.
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> (iii) father, Pitchaimuthu a/l Karuppiah — sixth defendant in the Civil Suit.
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> (iv) mother, Ramayee a/p Muthu — seventh defendant in the Civil Suit.
>
> all of whom had been sued by HSBC in the Civil Suit because of the first defendant, for it was the first defendant who had given the cheques to the various members of his family and when sued by HSBC, they had asked the first defendant to defend the legal actions. The first defendant requested me to represent them to clear the family name in the court in the actions for conspiracy to Defraud against them. As agreed the plaintiff has not charged

> any legal fees to the first defendant's parents and sister but his brother, the second defendant was to settle the plaintiff's fees himself.

As I see it, a lot of work had been done by the plaintiff stretching from 1982 to 1996. The civil matter, to pick a phrase, went through the whole works, to the SAR, the judge in chambers, the High Court, the Supreme Court and the Court of Appeal (see *Hongkong Bank (M) Bhd. v Raja Letchumi a/p Ramarajoo* [1996] 2 MLJ 36, ie the lead action to CS 127/1982). I find that the RM40,000 as agreed between the parties to be fair and reasonable fees considering the nature of work done and the time period and preparation taken to perform them. There is ample evidence adduced by the plaintiff to support the claim that the terms agreed to in HS-5 are absolutely reasonable. I also find no evidence to show that the plaintiff was domineering in its conduct towards D1; that the execution of HS-5 was a transaction at arm's length and that D1 was in no way disadvantaged by reason of the confidential relationship he had with the plaintiff. I further find that the plaintiff had satisfactorily rebutted the presumption of undue influence cast upon it by virtue of the existing solicitor-client relationship. D1, on the other hand had not advanced any cogent argument or proof to contradict either the validity of HS-5 or its reasonableness, save for the point on coercion which, as earlier held, is baseless.

The end result to this dispute can be put by borrowing the words of Sir John Romilly MR in the case of *Stedman v Collett* (1854) 51 ER 1171:

> ... I am of the opinion that the settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by this court where it has been entered into fairly and with proper knowledge on both sides.

Similarly, on the facts here, I find that there had been an open transaction entered into fairly and with proper knowledge of both sides in agreeing to the terms under HS-5.

The plaintiff in this application is prepared to have its bills taxed, as reflected in its alternative prayer, but after serious consideration of the background to this application as borne out from the various affidavits, I am minded to allow the plaintiff the declaratory relief sought and order that HS-5 be enforced. The interim injunction is confirmed and shall continue until execution of this order. Costs of this application is allowed to the plaintiff and shall be borne by D1.

Application allowed.

Reported by Jafisah Jaafar